NO. 50924-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GEORGE MICHAEL CHAPA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00683-3

BRIEF OF RESPONDENT

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SERVICE	Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: tweaver@tomweaverlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 6, 2018, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether a scrivener's error should be corrected?

3. Whether several of the conditions of sentence are too vague?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

George Michael Chapa was charged by information filed in Kitsap County Superior Court with second degree possession of depictions of minors engaged in sexually explicit conduct. CP 1. Later, a first amended information changed the charge to one count of first degree child molestation. CP 10.

Chapa pled guilty to the child molestation charge. CP 19-28. The plea agreement indicated that the state would recommend a standard range sentence (51-68 months). CP 13-14. It also allowed Chapa to request a SpecialSexOffenderSentencingAlternative (SSOSA). CP 15. Chapa was advised of the requirements of a SSOSA sentence in the plea form. CP 25.

The Department of Corrections did a presentence investigation

(PSI). CP 32-38. The Community Corrections Officer (CCO) who wrote the PSI did not have access to Chapa's psychosexual evaluation. CP 37. But the CCO recommended against a SSOSA sentence. CP 37-38.

Pursuant to Chapa's request for a SSOSA, he sat for a psychosexual evaluation by Haley D. Gummelt, Ph.D. CP 97-129. The doctor studiously addressed the requirements of RCW 9.94A.670. *See* "Summary" CP 127-28. The doctor opined that Chapa met the requirements and recommended a course of treatment. Id.

At sentencing, the state objected to a SSOSA. RP 4. This because the state believed that Chapa lacked remorse, denied his deviant interests, and engaged in "extreme minimization." Id. Further, these concerns were underlined by the discovery of a great deal of child pornography on Chapa's computer. RP 5.

The trial court heard from the victim's mother, Marisa Blair. RP 5-9. She spoke against giving Chapa a SSOSA sentence. Id. She intimates that Chapa's behavior had resulted in her loss of custody of her children, including the victim. RP 7-9.

The trial court heard from the maternal grandmother, Diane Blair. RP 9-11. The grandmother was unflattering toward Chapa but did not directly address the question of the SSOSA sentence.

The trial court ruled denying the SSOSA request. RP 22. The trial court indicated that "in reviewing all of the factors, I cannot find that this court should override the victim's opinion. And there is risk to the community." RP 22. The factors considered included what the trial court characterized as an "impassioned presentation" against SSOSA by the victim's mother. RP 20. Following the statutory command to give great weight to the victim's opinion, the trial court looked for something "very, very compelling for me to overcome that." RP 21.

The trial court believed that the psychosexual report "raised significant concern and doubt." RP 21. The trial court believed that the report left out too much history of deviant sexual interest. Id. The trial court quoted the report: "The defendant has engaged in extreme minimization and denial of sex offenses, despite evidence to the contrary." RP 21. The report had rated Chapa as a moderate risk for re-offense, which caused "significant concern" that Chapa is a danger in the community. RP 21-22. Finally, the trial court inferred from the material before it, particularly the minimizations, that Chapa's true intentions were not manifest. RP 22. Thus "I can't find that this is the best thing for the community." Id.

B. FACTS

In the plea form, Chapa admitted that he "had sexual contact with AMW, who is less than 12 years old. I am at least 36 months older than AMW and am not married to her." CP 28.

The certificate of probable cause filed addressed the facts of the initial possessing depictions charge only. CP 4-5. No such document appears in the record with regard to the amended charge of child molestation. However, Chapa stipulated to probable cause for that charge. RP, 6/26/17, 3.

III. ARGUMENT

A. THE ISSUE OF THE MOTHER'S STANDING WAS NOT PRESERVED AND CHAPA'S ASSERTION THAT SHE HAD NO STANDING IS BOTH FACTUALLY AND LEGALLY INCORRECT.

1. The issue was not preserved.

No objection was lodged below as to Ms. Blair's presentation to the trial court. RAP 2.5(a) provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The exceptions to the rule do not apply in this case: the trial court had jurisdiction, there was no failure to establish facts upon which relief can be granted, and the present issue is not a "manifest error affecting a

constitutional right." RAP 2.5(a)(1), (2), and (3).

Cases have held that "illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Bahl,* 164 Wn.2d 739, 744, 193 P.3d 678 (2008), *citing, State v. Ford,* 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Here, the trial court's discretionary ruling was neither illegal nor erroneous. That is, the trial court did every part of the procedure for considering SSOSA sentences, including hearing and considering the opinion of AW's parent, Ms. Blair.

A "parent" is defined as "one that begets or brings forth offspring," or as "a person who brings up and cares for another." Merriam-Webster online dictionary, www.merriam-webster.com. There is no fact in this record rebutting the fact that Ms. Blair begat AW. There is no fact in this record rebutting that Ms. Blair was in the process of bringing up and caring for AW and that this continued until Chapa's molestation disrupted the process.

This situation dovetails with the reasons for rule 2.5(a).

> The underlying policy of the rule is to encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (En banc) (internal quotation omitted; alteration by the court). Where, as here, the

trial court did not exercise its discretion in an illegal or erroneous manner, and appellate raises an unpreserved error on appeal, the appellant should be required to show that the matter constitutes a manifest constitutional error. RAP 2.5(a) (3).

In this context, then, Chapa needs to show the particular constitutional interest being impacted. *See O'Hara,* 167 Wn.2d at 98-99. He has not. No case holds that Chapa has a constitutional interest in receiving a SSOSA sentence. Constitutional errors are not presumed. Id. It simply cannot be said as a constitutional principle that Chapa has a right to have the trial court not hear from or consider the position of a child molestation victim's mother, who was at least the legal mother during the period of time that the molestation occurred. There is no constitutional error here.

But if this court finds that the general rule about raising allegedly illegal sentences for the first time on appeal applies or finds that an error of constitutional magnitude obtains, Chapa must also show that the same is "manifest." A finding of manifest error requires a showing of actual prejudice. This requires showing that the alleged error had "actual and identifiable consequences to [the sentencing] of the case." *O'Hara,* 167 Wn.2d at 99 (alteration added). Ms. Blair's presentation and the trial court's consideration of it, had consequences to Chapa's sentence. But there is more to the rule.

The *O'Hara* court explains:

> The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

167 Wn.2d at 99-100 (internal citation, page breaks, and footnotes omitted). In the present case, the trial court could not have foreseen the claimed error. If this court places itself in the shoes of the trial court, it becomes clear that the trial court was not in a position to correct a potential problem here without objection or argument from the defense.

The present alleged error is neither of constitutional magnitude nor manifest in the record. The issue should not be reviewed.

2. If reviewable, the issue lacks merit because Ms. Blair meets the definition of victim in the statute and under the Washington Constitution.

Chapa argues that the trial court abused its discretion in relying on the opinion of the victim's biological mother, whose parental rights had been terminated. This claim is without merit because Ms. Blair

nevertheless meets the definition of victim in the statute and a contrary finding will run afoul of Washington Constitution Article 1, §35.

The case involves statutory interpretation and thus the standard of review is de novo. *State v. Landsiedel*, 165 Wn .App. 886, 890, 269 P.3d 347 (2012). The reviewing court ascertains and carries out the legislature's intent. Id. The inquiry begins with the plain meaning of the statutory terms and ends there if that plain language is unambiguous. Id.

First, the state disagrees with Chapa from a purely factual point of view. AW's mother lost custody of her because she, the mother, supported Chapa when the allegations surfaced. Thus Ms. Blair was legally the mother of AW at all times during which Chapa was molesting AW and at the time of his arrest. Sentencing was about those things, not Ms. Blair's dependency case.

Second, Ms. Blair is a victim, either before or after termination of parental rights. RCW 9.94A.670(c) provides

> "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

Ms. Blair falls under the first sentence. She is "any person." Her presentation to the trial court leaves no doubt that Chapa's molestation of her daughter left her with rather severe emotional and psychological

injury. Because she supported Chapa, her children were taken from her. Without Chapa's molestation, that does not happen. Ms. Blair is a victim by the plain language of the statute. *But see State v. Landseidel*, 165 Wn. App. 886, 269 P.3d 347 (2012) (fact of emotional and psychological injury does not make defendant's wife a victim with respect to the relationship requirement of RCW 9.94A.670(2)(e)).

Next, Ms. Blair falls squarely within the second definition of victim in the statute. The word "parent" as used in the second sentence has no limitation such as "legal parent." Chapa must read this extra word into the statute in order for his argument to wash. As seen above, the definition of the word "parent" also does not include considerations of legality. Rather, the plain English definition focusses on the biological status of the individual as "one who begets or brings forth offspring." *See supra* at 5. Moreover, the distinction between one who begets, a parent, and others in positions of care toward children is covered by the legislature's inclusion of the phrase "or guardian." If the legislature meant the word "parent" to include legal guardians and exclude biological parents, the additional phrase "or guardians" is superfluous.

Moreover, pursuant to Washington Constitution Article 1, §35, the provision in RCW 9.94A.670 should be liberally construed. The victim's rights amendment to the constitution includes that "In the event the victim

is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights." Construing the statute as restricting the range of individuals who may "appear to exercise the victim's rights" violates this provision.

Courts give respect to the legislature as a coequal branch of government that is "sworn to uphold the constitution." *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). Thus "[w]e assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment." This respect and deference leads, again, to the conclusion that, in the context of this case, the word "victim" should be liberally construed to comport with the constitution's command that a representative should be allowed to assert AW's victim rights at sentencing.

Ms. Blair is at once all three things: She is a victim as such by the emotional and psychological impact of Chapa's acts; she is the parent of a victim when that word is given its plain language definition; she is the person called before the trial court to represent and advance the victim rights of her daughter. There was no error in giving her opinion on the SSOSA sentence or in the trial court giving that opinion great weight.

B. THE CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER'S ERROR AND TO STRIKE IMPROPER CONDITIONS OF SENTENCE.

Chapa next claims that there is a scrivener's error in the judgment and sentence and that several conditions of his sentence are unconstitutionally vague. The state concedes that some but not all of the sentence conditions should be stricken.

First, the state agrees that the trial court intended to incorporate the Department of Corrections Appendix H to the judgment and sentence. And, it is appropriate to remand to allow signature on that document. Finally, the state agrees that judicial economy is best served by addressing Chapa's community custody arguments in the present posture.

Unlike the SSOSA issue above, Chapa may raise vagueness challenges to sentencing conditions for the first time on appeal as long as the issues are purely legal, do not require factual development, and the condition is final. *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010), *citing State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

A trial court's imposition of community custody conditions is discretionary and will not be reversed unless manifestly unreasonable. *Valencia*, 169 Wn.2d at 791. Conditions of sentence are not presumed to be constitutional. Id. at 793. Imposing an unconstitutional condition is

manifestly unreasonable. Id. at 792. But a trial court may always impose crime-related prohibitions. RCW 9.94A.505 (8). Such conditions "prohibit conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The term "directly related" is broadly defined to include things that are "reasonably related" to the crime. *State v. Irwin,* 191 Wn.App. 644, 656, 364 P.3d 830 (2015).

The vagueness doctrine serves to give notice to a citizen of proscribed conduct and serves to protect against arbitrary enforcement. *Valencia,* 169 Wn.2d at 791. But the person upon whom the conditions are imposed need not be able to predict with absolute certainty what conduct is prohibited. Id. at 793. Impossible standards of specificity are not required. *See State v. Norris,* 1Wn. App.2d 87, 94, 404 P.3d 83 (2017). There must be "ascertainable standards of guilt to protect against arbitrary enforcement." *Valencia,* 169 Wn.2d at 794, *quoting Bahl*, 164 Wn.2d at 753.

1. Sentencing condition #13 is not too vague but the state concedes that the prohibition on going to fast food restaurants should be stricken. (PARTIAL CONCESSION OF ERROR).

Chapa claims that condition #13 from Appendix H violates these principles. By that condition Chapa "Shall not frequent places where minors congregate including parks, playgrounds, schools, campgrounds,

arcades, malls, daycare establishments and/or fast food restaurants." CP 40. He claims that the phrase 'minors congregate" is too vague and that the examples of "malls" and "fast food restaurants" are too broad.

In *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015), a condition stating "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO", was too vague. But not very vague. "Without some clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel), the condition does not give ordinary people sufficient notice to understand what conduct is proscribed." Id. at 655. In the present case, it is not left to a community corrections officer (CCO) to decide in a vacuum where those points of congregation are found. The examples given—schools, daycare establishments, playgrounds, etc.—clarify the condition and illustrate the types of locations being addressed. Moreover, in this day and age "malls" belongs on the illustrative list: people of ordinary intelligence know that children congregate there.

CONCESSION: The state concedes that condition #13 should be amended to strike "fast food restaurants" from the list of illustrative places that Chapa cannot frequent.

2. Sentencing condition #15 is not crime related on this record and should be stricken. (CONCESSION OF ERROR)

In *State v. Norris*, 1 Wn. App. 87, 98, 404 P.3d 83 (2017), a very

similar prohibition was ordered stricken. Even though Norris had committed child molestation, there were no facts in the record showing that Norris had frequented such establishments. Thus the prohibition was not crime related.

Similarly, in the present case, there is no showing that Chapa attended such exhibitions.

CONCESSION: Condition # 15 should be stricken.

3. Sentencing condition #16 is not unconstitutionally vague and is crime related.

Sentencing condition #16 provides that Chapa "Shall not own, use, possess or peruse sexually explicit materials or access devices where these materials may be viewed, including computers, without authorization from the CCO and/or therapist." This formulation is not unconstitutionally vague.

In *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) our Supreme Court engaged the struggle that always attends attempting to define the word "pornography." The word remains inscrutable and a condition of sentence using the word was held to be unconstitutionally vague. Id. at 758. However, the *Bahl* court decided that the use of the term "sexually explicit" is not constitutionally infirm. Id. at 760. Thus *Bahl* does not support Chapa's argument here.

Moreover, it must be recalled that this case began with the discovery of Chapa with sexually explicit pictures of his victim and in the investigation over 200 such images were discovered on his computer. This is a crime related condition and should remain.

4. Sentencing condition #17's curfew condition is not crime related. (PARTIAL CONCESSION OF ERROR)

Sentence condition #17 provides that Chapa "Shall be subject to

geographical restrictions and curfew requirements as directed by his/her CCO." CP 40. Chapa says that curfews must be crime related and says nothing else about this provision. There is no challenge to the geographical restrictions portion of this order. There does not appear to be any facts in the case that support the curfew portion of the condition.

PARTIAL CONCESSION OF ERROR: The curfew condition should be stricken but the geographical condition should remain.

5. Sentencing condition #20 is unconstitutionally vague. (CONCESSION OF ERROR)

Sentencing condition #20 provides that Chapa "Shall not pursue intimate, romantic or sexual relationships without authorization from his/her CCO and/or therapist." CP 40. The words "intimate" and "romantic" are too vague. *See Norris, supra,* at 94-95. Moreover, the question of sexual relationships with minors is already addressed in condition #12, prohibiting contact with minors under 18, (CP 40) and in the condition in the judgment and sentence prohibiting offenses against children. CP 89. And, condition #21 protects people who have or care for minor children. (CP 41) The purpose of the "sexual" part of this condition is covered and there are no facts in the record indicating that any other kind of sex was crime related.

CONCESSION OF ERROR: Condition #20 should be stricken.

6. Sentencing condition #21 is crime related.

Sentencing condition # 21 provides that Chapa "Shall not form relationships with individuals who have care and custody of minor children without authorization from the CCO and/or therapist." He argues vagueness because the word "relationship" could entail a "dating relationship, familial relationship, work-colleague relationship, student-teacher relationship, etc." Brief at 15. The state believes that this

vagueness disappears by answering "yes." That is, this prohibition should apply to all of the permutations of relationships that Chapa identifies and any others he can think of. If the friend, colleague, family member, etc. has minor children, Chapa should stay away unless upon disclosure his CCO or therapist allow it.

No small part of the present case involves harm within a family or relationship setting. Chapa prayed on Ms. Blair's minor daughter. This prohibition is crime related and should remain.

IV. CONCLUSION

For the foregoing reasons, the matter should be remanded to allow the trial court to properly append Appendix H and to strike the improper conditions of sentence. In all other respects, Chapa's conviction and sentence should be affirmed.

DATED February 6, 2018.

Respectfully submitted,

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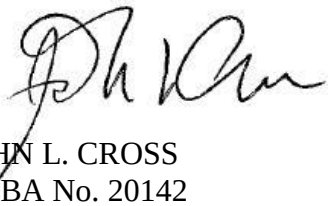

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